

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHRISTOPHER WALKER,

Defendants.

Case No. 2:14-cr-00335-KJD-CWH

ORDER

This matter is before the Court on Defendant Christopher Walker's ("Walker") motion to suppress based upon an illegal Terry stop (doc. # 31), filed May 5, 2015, the government's response (doc. # 32), filed May 19, 2015, and Walker's reply (doc. # 33), filed May 26, 2015. The Court conducted evidentiary hearings on July 16, 2015 and August 6, 2015.

FACTS AND PROCEDURAL HISTORY

Lopaka Harris ("Harris"), a clerk at a Rebel gas station in Las Vegas, testified that on May 24, 2015, an individual later identified as Walker entered the store, walked around the store, and as he passed the clerk's counter, moved his backpack and pulled up his shirt to show a gun in a holster on his hip. Harris informed Walker that the store had a "no firearms" policy. Harris claims that he told Walker to leave three or four times, and Walker responded by "talking junk." Harris testified that the manner in which Walker displayed the gun was not threatening, but he was nevertheless afraid and shocked because of the presence of the gun. Harris subsequently dialed 911 and reported to police that there was a man in the store who was brandishing a gun and became verbal when asked to leave.

1 Metropolitan Police Officer Kaplan ("Officer Kaplan") was dispatched to the store. As Kaplan
2 was on his way, the computer monitor in his patrol car displayed a written report from dispatch
3 indicating a "Male inside store with a 413 / not threatening people" and that "Male was walking
4 around pulling up his shirt to brandish his 413 / saying he has a CCW, BMA, 20s, 6'1", Med Bld, Blk
5 Hr, Blu Shirt, Blk Shorts, w/ a WFA, 20s, Gry Shirt, Blu Jns." Government Exhibit A. Moments later,
6 the report indicated that "Subj became verbal when asked to leave store due to brandishing 413." *Id.*

7 Officer Kaplan testified that he arrived at the parking lot of the store, which was in his normal
8 patrol area, about three minutes after receiving the radio dispatch broadcast. Because he has
9 investigated numerous crimes in the area, Officer Kaplan considers the location of the store to be in
10 a high crime area.

11 According to dispatch records, Officer Kaplan reported that he arrived at the store at 23:28:56
12 hours. Government Exhibit A. At about the same time, radio dispatch broadcast that Walker "is
13 starting to scare people." When Officer Kaplan arrived at the store parking lot, he observed a man who
14 matched the description given to him by dispatch, later identified as Walker, near a bus stop adjacent
15 to the store parking lot. As Officer Kaplan approached Walker, he noticed that Walker had a holster
16 on his hip carrying an unconcealed pistol. Officer Kaplan testified that, at the time, he believed that
17 he was investigating a possible assault with a deadly weapon because the store clerk was reportedly
18 afraid of Walker brandishing or threatening people with a firearm, and arguing with the clerk when
19 he was asked to leave. Officer Kaplan testified that with "officer safety" in mind, as he had no partner
20 and considered the store to be in a high crime area, he detained and handcuffed Walker and seized
21 Walker's firearm.

22 According to Officer Kaplan, Walker identified himself as Victor Gerard and provided a date
23 of birth. Walker had no written forms of identification, which was suspicious to Officer Kaplan.
24 Officer Kaplan testified that he believed Walker was being untruthful about his identity. Within a
25 minute, Officer Kaplan contacted dispatch to inquire about whether the name Victor Gerard had
26 possible warrants, and he was advised that there were no pending warrants. Metropolitan Police
27 Officer Gilbert ("Officer Gilbert") arrived on the scene about the same time as Officer Kaplan and
28 assumed custody of Walker while Officer Kaplan continued his investigation.

1 unlawful. The government responds that there was reasonable suspicion to justify Walker's detention,
 2 and absent reasonable suspicion, the discovery of the firearm was inevitable because it would have
 3 otherwise been lawfully obtained.

4 **A. Initial Encounter**

5 It is well established that police may stop a citizen at any time, request identification and other
 6 information, and even request permission to search so long as a reasonable innocent person in the
 7 citizen's position recognizes that he or she is free to leave or terminate the encounter. *See generally*
 8 *Terry v. Ohio*, 392 U.S. 1 (1968); *Florida v. Royer*, 460 U.S. 491 (1983); *Florida v. Rodriguez*, 469
 9 U.S. 1 (1984). Police officers can approach individuals as to whom they have no reasonable suspicion
 10 and ask them potentially incriminating questions as "mere police questioning does not constitute a
 11 seizure." *Florida v. Bostick*, 501 U.S. 429, 437 (1991).

12 For Fourth Amendment purposes, a seizure occurs "when the officer, by means of physical
 13 force or show of authority, has in some way restrained the liberty of a citizen." *Terry*, 392 U.S. at 19,
 14 n.16. In *United States v. Mendenhall*, 446 U.S. 544 (1980), the U.S. Supreme Court developed the
 15 *Mendenhall* test for determining when a seizure occurs. "A person has been 'seized' within the
 16 meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the
 17 incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554.

18 The Court finds that, under the *Mendenhall* test, Walker was seized for purposes of the Fourth
 19 Amendment when Officer Kaplan confronted Walker outside of the Rebel store in response to the 911
 20 call, seized Walker's firearm, and placed Walker in handcuffs to conduct the investigation.¹

21 **B. Investigatory Detention**

22 "The Fourth Amendment permits brief investigative stops... when a law enforcement officer
 23 has a particularized and objective basis for suspecting the particular person stopped of criminal
 24 activity." *Navarette v. California*, 134 S.Ct. 1683, 1687 (2014). An investigatory detention under
 25 the Fourth Amendment must be supported by "reasonable suspicion" that criminal activity may be
 26 afoot. *See Terry v. Ohio*, 392 U.S. at 1; *United States v. Arvizu*, 534 U.S. 266, 273 (2002). In

27
 28 ¹ The Court notes that Walker offers no argument that the use of handcuffs converted the investigatory stop to an arrest. The Court also notes that handcuffing a suspect does not automatically convert an investigatory stop into an arrest that requires probable cause. *See Washington v. Lambert*, 98 F.3d 1181, 1186 (9th Cir. 1996).

1 assessing whether an officer has reasonable suspicion to conduct an investigatory detention, reviewing
2 courts look at the “totality of the circumstances” of each case to see whether the detaining officer had
3 a “particularized and objective basis” for suspecting legal wrongdoing. *Id.* “An investigatory stop
4 must be justified by some objective manifestation that the person stopped is, or is about to be, engaged
5 in criminal activity.” *United States v. Cortez*, 449 U.S. 411, 417 (1981); *see also United States v.*
6 *Sigmond-Ballesteros*, 285 F.3d 1117, 1121 (9th Cir. 2002) (citing *Arvizu*, 534 U.S. at 273).

7 A reviewing court’s determination of “reasonable suspicion” is a process that “allows officers
8 to draw on their own experience and specialized training to make inferences from and deductions about
9 the cumulative information available to them that ‘might well elude an untrained person.’” *Arvizu*, 534
10 U.S. at 273 (citing *Cortez*, 449 U.S. at 418). The Fourth Amendment is satisfied if an officer’s action
11 is supported by reasonable suspicion that criminal activity may be afoot, and observation of factors
12 that are, by themselves, consistent with innocence may still collectively amount to reasonable
13 suspicion. *Id.* at 273-74. Reasonable suspicion is not a matter of hard certainties but of probabilities.
14 *Cortez*, 449 U.S. at 417-18. The reasonable suspicion necessary to justify such a stop “is dependent
15 upon both the content of information possessed by police and its degree of reliability.” *Navarette*, 134
16 S.Ct. at 1687. The reasonable suspicion standard is less than a preponderance of the evidence. *United*
17 *States v. Sokolow*, 490 U.S. 1, 7 (1989).

18 Here, the Court finds that Officer Kaplan was justified in detaining Walker pending further
19 investigation. Officer Kaplan knew that a 911 emergency call reported a man with a gun at a
20 convenience store in a high crime area at around midnight. The report sent to Officer Kaplan’s vehicle
21 indicated that a man was pulling up his shirt to brandish a firearm and “became verbal” when asked
22 to leave the store. Upon arrival, Officer Kaplan found an individual matching the description of the
23 suspect outside of the Rebel store carrying a firearm. Officer Kaplan testified that upon his arrival,
24 he believed he was investigating a possible assault with a deadly weapon because Walker was
25 reportedly brandishing a firearm, threatening people, and refusing requests to leave the store. Officer
26 Kaplan’s belief was reasonable under the circumstances.

27 Of course, there are legitimate and legal reasons for a person to carry a weapon into a store,
28 concealed or not. *Terry* contemplates the resolution of such ambiguities during the stop. *See Adams*

1 v. *Williams*, 407 U.S. 143, 145-47 (1972). In *Adams v. Williams*, the Supreme Court explained that:

2 The Fourth Amendment does not require a policeman who lacks the precise level of
3 information necessary for probable cause to simply shrug his shoulders and allow a
4 crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be
5 the essence of good police work to adopt an intermediate response. A brief stop of a
6 suspicious individual, in order to determine his identity or to maintain the status quo
7 momentarily while obtaining more information, may be most reasonable in light of the
8 facts known to the officer at the time.

9 *Id.* at 145-47.

10 A valid stop can include the momentary restriction on a person's freedom of movement in order
11 to maintain the status quo while making an initial inquiry. See *United States v. Patterson*, 648 F.2d
12 625, 633 (9th Cir. 1981). Otherwise, an officer could not perform a preliminary investigation of an
13 alleged wrongdoing. See *United States v. Thomas*, 863 F.2d 622, 628 (9th Cir. 1988). In cases where
14 "the conduct justifying the stop was ambiguous and susceptible of an innocent explanation," *Terry*
15 recognizes that "officers could detain the individuals to resolve the ambiguity." *Illinois v. Wardlow*,
16 528 U.S. 119, 125 (2000). This was such a case.

17 At the hearing, a portion of the radio dispatch recording was heard that revealed those
18 communications Officer Kaplan received, including the radio dispatcher's statement that Walker was
19 "starting to scare people." Walker argues that this information was not accurate and simply an
20 embellishment by the dispatcher.

21 Latoya Guidry ("Guidry"), a Metro employee who received the 911 call from Harris, explained
22 at the hearing that her job was to collect information from a 911 caller and type pertinent information
23 into the computer system. The computer system then communicated the information to the radio
24 dispatcher and to the officer's patrol car. Using that information, the radio dispatcher would make
25 radio calls to coordinate and monitor officers regarding the incident. Guidry testified, however, that
26 she had no other communication with the radio dispatcher regarding her conversation with Harris.
27 Because the information did not come from Guidry, it appears that the radio dispatcher simply
28 surmised that Walker was "starting to scare people."

Assuming the dispatcher embellished as to whether people were afraid, Officer Kaplan was
nevertheless justified in beginning his investigation by seizing and disarming Walker. Officer Kaplan
found Walker, who matched the physical description of the suspect, outside the store with a gun. This

1 verified that there was some basis for the 911 call. Officer Kaplan knew that an emergency complaint
2 had been made about a man in a store “brandishing” a gun.² Initially, the computer report indicated
3 that the brandishing was not done in a threatening way, but the report also indicated that the individual
4 refused to leave when asked to do so. It is a misdemeanor under Nevada law to refuse to leave a
5 building after being warned by the owner to do so. *See* NRS 207.200. It was also reasonable for
6 Officer Kaplan to investigate whether the weapon had been used in an intimidating manner. The Court
7 finds that Officer Kaplan’s belief that “criminal activity was afoot,” based upon Officer Kaplan’s
8 experience and specialized training, was therefore reasonable. *Terry*, 392 U.S. at 30. Accordingly,
9 there was sufficient basis to detain Walker pending further investigation, even without the dispatcher’s
10 purported embellishment that Walker was scaring people.

11 **C. Delay in Investigation**

12 Walker next argues that the delay in conducting the investigation converted the *Terry* stop into
13 a *de facto* arrest without probable cause. In assessing whether a detention is too long in duration to
14 be justified as an investigative stop, the court examines whether police diligently pursued a means of
15 investigation that was likely to confirm or dispel their suspicions quickly, during which time it was
16 necessary to detain the defendant. *See United States v. Sharpe*, 470 U.S. 675, 686 (1985) (20 minutes
17 stop not unreasonable).

18 According to records and Officer Kaplan’s testimony, Walker was detained at about 11:30 p.m.
19 and was arrested at about 11:55 p.m. *See* Government Exhibit 1. The investigation therefore took
20 about 25 minutes. During this time, Officer Kaplan interviewed Harris and reviewed the surveillance
21 video to determine whether any illegal conduct was recorded. The store manager needed to be
22 summoned to allow Officer Kaplan to review the video, which undoubtedly caused delay. However,
23 considering the import of the video and the seriousness of the potential offense of assault with a deadly
24 weapon, it was reasonable for Officer Kaplan to review the video to determine whether it contained
25 evidence of what had occurred at the store. The Court finds that Officer Kaplan diligently pursued his
26 investigation to quickly dispel his suspicions, with the passage of 25 minutes not at all unreasonable.

27
28 ² The Ninth Circuit has held that brandishing a weapon for purposes of 18 U.S.C. § 924(c)(1) requires the open display of the firearm, or knowledge of the firearm’s presence by another in some manner, for the purpose of intimidation. *United States v. Beaudion*, 416 F.3d 965, 968 (9th Cir. 2005).

1 Therefore, the Court concludes that Walker's detention did not become a *de facto* arrest.

2 Meanwhile, after interviewing Harris and reviewing the surveillance video, Officer Kaplan
3 decided he would resolve the matter with a trespass notice rather than arrest Walker and pursue
4 criminal charges. But for Berry's statement to Officer Gilbert that the marijuana belonged to Walker,
5 and Walker's own admission that the marijuana was his, the matter would have ended. As Officer
6 Kaplan returned to where Walker was being held, however, Officer Kaplan learned that Walker was
7 in possession of marijuana as well as a firearm. Officer Kaplan reasonably began an investigation into
8 the new allegation related to Walker's possession of narcotics, which led to Walker's arrest. Walker
9 offers no argument that his subsequent arrest, based upon his own statements, was not supported by
10 probable cause.³

11 RECOMMENDATION

12 Accordingly, **IT IS HEREBY RECOMMENDED** that Defendant Christopher Walker's
13 motion to suppress based upon an illegal Terry stop (doc. # 31) be **denied**.

14 NOTICE

15 This Report and Recommendation is submitted to the United States District Judge assigned to
16 this case under 28 U.S.C. § 636(b)(1). A party who objects to this Report and Recommendation may
17 file a written objection supported by points and authorities within fourteen days of being served with
18 this Report and Recommendation. Local Rule IB 3-2(a). Failure to file a timely objection may waive
19 the right to appeal the District Court's Order. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).

20 DATED: August 20, 2015

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22
23 
24 C.W. Hoffman, Jr.
25 United States Magistrate Judge
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³ Because the Court finds that the investigatory detention was not unreasonable, the Court will not address the government's argument regarding inevitable discovery.